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IN THE

SUPREME COURT OF THE UNITED STATES

JEROME R. FREED, **Appellant,**

vs.

RONALD J. BALDI; The Civil Service Commission of the City and County of Denver; Ted Bach, Arthur S. Bowman, Larry J. Perry, Individually and as members of the Civil Service Commission in and for the City and County of Denver and State of Colorado; J. T. Dinan, Secretary and Chief Examiner of the Civil Service Commission in and for the City and County of Denver and State of Colorado; Harold Dill, Chief of Police, George Seaton, successor; Hugh C. McClearn, Manager of Safety and Excise of the City and County of Denver and State of Colorado; Howard K. Phillips, successor; ANDY L. YOUNG, WILLIAM R. SWOPE, RUSSELL TAVANNER, THOMAS W. DINSMOOR, RICHARD A. MIKLICH, LORNE A. JOHNSON, JOSEPH A. McCORMICK, LYLE D. HESALROAD, JAMES K. LINVILLE, DWIGHT M. OSTERBERG, JAMES A. HARTFORD, JR., MORRIS J. MULLINS, ALBERT N. KINNEY, EDWARD T. McNELLIS, JACK D. SEVIER, VERNON J. JOHN ELLWIN H. HAARHUES, HAROLD L. SHALBRACK, CHARLES D. HOAGLIN, HARVEY L. SALTZ, KEITH E. RUMMERFIELD, GAIL TWIBELL, IRA L. MAROTTE, JACK A. WINTIBAUGHT, BERT J. ALEXANDER, WILLIAM E. GOODHARD, JR., LESLIE L. JENKINS, LESTER E. STREET, GILLEM WELLS, JOSEPH F. GOFF, DELBERT W. CLARK, JACK A. PEACHEY, JOHN E. MORITZKY, AND FRANKLIN D. SCHULTZ, **Appellees.**

JURISDICTIONAL STATEMENT AND APPENDICES.

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IN THE

SUPREME COURT OF THE UNITED STATES

JEROME R. FREED, **Appellant.**

vs.

RONALD J. BALDI; The Civil Service Commission of the City and County of Denver; Ted Bach, Arthur S. Bowman, Larry J. Perry, Individually and as members of the Civil Service Commission in and for the City and County of Denver and State of Colorado; J. T. Dinan, Secretary and Chief Examiner of the Civil Service Commission in and for the City and County of Denver and State of Colorado; Harold Dill, Chief of Police, George Seaton, successor; Hugh C. McClearn, Manager of Safety and Excise of the City and County of Denver and State of Colorado; Howard K. Phillips, successor; ANDY L. YOUNG, WILLIAM R. SWOPE, RUSSELL TAVANNER, THOMAS W. DINSMOOR, RICHARD A. MIKLICH, LORNE A. JOHNSON, JOSEPH A. McCORMICK, LYLE D. HESALROAD, JAMES K. LINVILLE, DWIGHT M. OSTERBERG, JAMES A. HARTFORD, JR., MORRIS J. MULLINS, ALBERT N. KINNEY, EDWARD T. McNELLIS, JACK D. SEVIER, VERNON J. JOHN ELLWIN H. HAARHUES, HAROLD L. SHALBRACK, CHARLES D. HOAGLIN, HARVEY L. SALTZ, KEITH E. RUMMERFIELD, GAIL TWIBELL, IRA L. MAROTTE, JACK A. WINTIBAUGHT, BERT J. ALEXANDER, WILLIAM E. GOODHARD, JR., LESLIE L. JENKINS, LESTER E. STREET, GILLEM WELLS, JOSEPH F. GOFF, DELBERT W. CLARK, JACK A. PEACHEY, JOHN E. MORITZKY, AND FRANKLIN D. SCHULTZ, **Appellees.**

JURISDICTIONAL STATEMENT AND APPENDICES.

Comes now the Appellant above named, by his counsel, and, under and in pursuance of Rule 15 of the Rules of the Supreme Court, makes the following Jurisdictional Statement.

1(s). This Appeal arises from and upon the Judgment of the Supreme Court of the State of Colorado, in its consolidated actions, being *Jerome R. Freed, vs. Ronald J. Baldi,* et al., No. 23155, and *Andy L. Young* et al.,

vs. *The Civil Service Commission of the City and County of Denver,* et al., No. 23224, in which Opinion of the Court was rendered July 15, 1968, following which, and within the time prescribed by the Rules of Civil Procedure of the State of Colorado, Petition for Rehearing was filed. That Petition for Rehearing was denied, and remittitur (which is the judgment of the Supreme Court of Colorado under its proceedings) issued on August 6, 1968, remitting the matter to and instructing proceedings by the District Court in and for the City and County of Denver. The Opinion of the Court, which is reported in 443 P.2d 716, and which has not as yet been officially reported and printed in the Colorado reports, consisting of an Opinion by Mr. Justice Day, and separate and dissenting opinions by Mr. Chief Justice Moore and Mr. Justice Kelley. These opinions appear in Appendix A, Appendix A-1, and Appendix A-2, respectively.

1(b). This is a proceeding on appeal from a final judgment of the Supreme Court of the State of Colorado, involving a provision of the Constitution of the State of Colorado, with relation to which the Supreme Court of the State of Colorado has, in a proceeding wherein is drawn in question the validity of a treaty or statute of the United States, decided against the validity or applicability thereof, and has refused to apply the same; and, in the same appellate proceeding, wherein is drawn in question the validity of Colorado statute and constitutional provision upon the ground of repugnance to the Constitution, treaties, and laws of the United States, the Supreme Court of Colorado has decided in favor of the validity of the Colorado constitutional provision and statutory enactments in such manner as to ignore and fail to give force and effect to the statutes, treaties, and constitution of the United States.

This Appeal is taken in pursuance of Title 28, USCA, Section 1257 (1) and Section 1257 (2), as follow:

> "§ 1257. *State courts; appeal; certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

I. Article XII, Section 14, of the Constitution of Colorado deals with the matter of Civil Service, including in the provisions thereof Police Civil Service, and making provisions for Veterans preference. The applicable portion of the statute is set out verbatim in the majority opinion, Appendix A following, to which reference is made hereby, and which is incorporated herein. The specific portion in litigation here, however, is the veterans' preference section, as follows:

> "* * * Five points shall be added to the grades of candidates receiving a passing grade who served in the armed forces of the United States in *times of war* and who were honorably discharged therefrom, and also to the grade of candidates who are widows of those who served and were so discharged or who died during their service. Ten points shall be added to the grades of candidates receiving a passing grade who

incurred disability in the line of duty while so serving and who were so discharged. Eligibility list shall be kept and maintained for reasonable periods of all who have made passing grades in such examinations and the candidates placed thereon in the order of the grades received by them, including any points added, as herein provided. The persons on said lists shall be deemed the most fit and of the highest excellence, and shall be appointed or promoted in accordance with their order thereon.

"The times of war above referred to are the period of the Spanish-American War; the period of the Philippine Insurrection; the period from April 6, 1917, to November 11, 1918, both dates inclusive; the period from December 7, 1941, to the date proclaimed by the congress or president of the United States as the end of the war declared by the United States on December 8, 1941, both dates inclusive; *and the period of any war in which the United States may hereafter engage.* * * *" (Emphases supplied).

The foregoing and referred section of the Colorado Constitution (Article XII, Section 14) was adopted as an amendment at the election of November 7, 1944. It is found in Volume 1, 1963 CRS, as a part of the Colorado Constitution therein printed. The italicized or emphasized portions of the above quotation are so emphasized by the Supreme Court of Colorado in its opinion, and are the key portions of the provision for purposes of the instant litigation.

There are no facts in dispute in this action. All are stipulated.

Appellant, Jerome Freed, is a member of the Denver Police Department, who served in the Armed Forces of the United States, between June 13, 1952, and June 12, 1956, and for the whole of that period, during which service he suffered disability.

In a civil service examination held for promotion to rank of Sergeant in the Denver Police Department, Freed obtained a score which, combined with the Veterans Preference Points and disability points allowed and required by the Constitution (being 10 points), permitted promotion to the rank of Sergeant of Police, to which he was duly promoted, and which rank he duly exercised.

Thereafter, two actions were commenced by various police officers in the Denver District Court. In each of which actions Sergeant Freed was joined as a party defendant, as were The Civil Service Commission of the City and County of Denver, the Manager of Safety and Excise (who is the civilian head of the Police Department), and the Chief of Police, and in which actions Sergeant Freed as well as the Commission, the Manager, and the Chief represented and defended by the City Attorney.

The Plaintiff police officers in those actions asserted that no veterans preference points were allowable for any conflict after World War II; that the period of the Korean Conflict, during which Sergeant Freed saw service, was not a "time of war" or 'period of war" within the meaning of the Colorado Constitution, because the Korean Conflict was not a "declared" war.

The two actions were consolidated in the Trial Court, which disallowed the period of the Korean War as a "war", but did not modify Sergeant Freed's rank. Ser-

geant Freed prosecuted proceedings on error to the Supreme Court as No. 23155, joining all other parties as Defendants-in-Error, and officers Andy L. Young and others prosecuted error in No. 23224, joining Sergeant Freed and all other parties. The actions being identical, they were consolidated by the Colorado Supreme Court.

The Colorado Supreme Court, in an Opinion written by Mr. Justice Day and concurred in by four (4) others of the Court, held that the Korean Conflict was not a time or period of war, disallowed the veterans preference points given Sergeant Freed, and ordered his reduction in rank to patrolman. It sustained the Trial Court, otherwise, and ordered dismissal of the basic action of the plaintiffs, and permitted holding of new civil service examinations. Mr. Chief Justice Moore and Mr. Justice Kelley, each in written opinion, dissented, holding the period of the Korean Conflict to be a "time of war" or "period of war" within federal law, and holding as a matter of Federal Statute, and Federal Constitutional law, that Sergeant Freed was entitled to veterans preference points.

The Colorado Supreme Court, in the majority opinion, stated that the official date of termination of World War II is April 28, 1952. Citing United States Statutes, it further found that "the period in which the United States made its forces available in Korea pursuant to treaty responsibilities under the United Nations Charter to which the United States subscribed, was the period between June 27, 1950, and January 31, 1955. 38 USCA 101(9)." As a result, the Colorado Court recognizes as "war" a period from 1946 to 1952 during which, except for Korea, little armed activity took place, but refuses to recognize as "war" that period from 1952 through 1956 during which the Korean Confict principally occurred, a period defined

by Congress as a period of war, and a period in which several millions of men actively participated in military pursuits over a period of years.

What is "war" is a matter of Federal Law. The Colorado Constitution refers to "times of war" and to the "period of war" in which the United States may engage. A Federal Statute, Title 38, Section 101(11), USCA, specifically defines the term "*period of war*":

> "... the term 'period of war' means the Spanish American War, World War I, World War II, *the Korean Conflict,* and the period beginning on the date of any future declaration of war by Congress...." (Emphasis supplied).

Accordingly, when the Colorado Constitution uses the phrase "period of war", and when the United States Congress has by statute defined "period of war" in express terms to include the Korean Conflict, the Supreme Court of Colorado may not, consistently with the Constitution of the United States and the Supremacy Clause, Article VI, paragraph 2, ignor the Congressional definition and redefine the term.

Condition of war is for the determination of the Federal Government, not any state, and it is requisite that the Supreme Court of Colorado recognize that determination. Not only is the Korean Conflict defined as a "period of war" under Federal Statute, but, in Title 38, Section 101(9) the term "Korean Conflict" is so defined as to include the period of Sergeant Freed's service:

> "(9) The term 'Korean conflict' means the period beginning June 27, 1950, and ending on January 31, 1955."

Moreover, the United States is a subscribing party to the Charter of the United Nations (59 Stat. 1031). Chapter 1, Article 2, Section 5 of that Charter provides:

> "5. All Members shall give to the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

Chapter VII, Articles 39 to 51, inclusive, of that Charter provides for "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". By reason of the length of those provisions, they are appended hereto by appendix, as Appendix B.

In pursuance of Chapter VII, armed intervention in Korea was determined by the United Nations, and, in pursuance of that determination, the United States, during the period of the "Korean Conflict" supplied troops, as it was required by the Treaty, to do. That Treaty, under the Supremacy Clause of the Constitution, Article VI, paragraph 2, is entitled to effect as the "Supreme Law of the Land" in like manner as the Statutes of the United States, and may not be ignored or dishonored by any of the several States in the application of their own constitutional or statutory provisions, but the Treaty has not been applied by the Supreme Court of Colorado in the circumstances detailed, though called repeatedly to it attention.

Accordingly, it was urged that no legal distinction obtains between a citizen of the United States subjected to military hazard and rendering military service and incurring disability in World War II, which the Colorado Court says extends to April 28, 1952, and Sergeant Freed, whose military service began during the period of the

Korean Conflict, commencing in June, 1952, and continuing for four years thereafter.

Sergeant Freed has, accordingly, and at all stages of these proceedings, maintained that to deprive him of veterans preference points, according those points to all persons in the armed services through World War II, ending April 28, 1952, but not to persons in the armed services in time of war thereafter, including the Korean Conflict, constitutes a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. If the Colorado Constitution is interpreted as by the majority of the Colorado Supreme Court to ignore the Korean Conflict as "time of war" or "period of war", then there is granted thereby such benefit to persons in service through World War II, and withheld thereby such benefit to persons in service in "time of war" or "period of war" thereafter as to render the provision of the Colorado Constitution void.

Jurisdiction of this Court, therefore, is sought because:

1. The Supreme Court of Colorado, in appellate proceedings, relating to the Colorado Constitutional provision on veterans preference points, which by its terms is dependent upon existence of "time of war" or "period of war" has refused to consider the Korean Conflict a "time of war" or "period of war", although Federal statutes expressly define and declare it so to be, and has accordingly, where those statutes are drawn in question, decided against the validity of those statutes, and refused to apply them.

2. The Supreme Court of Colorado, in those same appellate proceedings, has refused to honor, and has effec-

tively decided against the validity of the United Nations Charter, a Treaty of the United States, deciding in favor of the validity of a challenged Colorado Constitutional provision as against the Federal Statutes and the Treaty of the United States, and so violating Article VI, Paragraph 2, of the Constitution of the United States, the Supremacy Clause.

3. The Supreme Court of Colorado, in those same appellate proceedings, has deprived the Appellant of equal protection of the laws, extending the benefit of veterans preference intended and worded to apply to all serving in the United States armed forces, to persons so serving through World War II only, and denying the benefits thereof to persons serving in "time of war" and "period of war" as defined by Statute of the United States, and particularly in the Korean Conflict.

Applicable dates of proceedings in the District Court Supreme Court of the State of Colorado are as follows:

1. Complaint was filed November 2, 1966, in No. B-96921 in the District Court by Ronald J. Baldi against the Civil Service Commission and its Constituent Members, the Chief of Police, the then Manager of Safety and Excise, and Appellant Freed. Answer was filed by the City Attorney for all Defendants, including Sergeant Freed, putting in issue all questions, and denying any invalidity in the allowance of veterans preference points for the Korean Conflict.

2. Complaint was filed January 25, 1967, by Andy L. Young and some thirty-five (35) other officers against essentially the same Defendants, challenging the allowance of veterans' preference points for service from June 13,

1952, through June 12, 1956, during the period of the Korean Conflict. Answer was similarly filed by the City Attorney for all Defendants, including Sergeant Freed, putting in issue the same basic question as in the first action.

3. On May 27, 1967, the two actions were by agreement of all parties and order of court consolidated, and tried to the Court, without a jury, upon stipulated facts.

4. On May 19, 1967, the Court entered an Order, requiring promotion of Mr. Baldi to Sergeant, staying certain pending civil service examinations and keeping the existing list in effect, but not ordering demotion of Sergeant Freed.

5. Within time provided by the Rules, there was filed by the City Attorney, on behalf of the official defendants and Sergeant Freed, a motion for new trial or judgment on the pleadings with a memorandum brief, in which the applicable federal statutes, the applicable treaty law, and the applicable constitutional authority was brought to the attention of the Trial Court. That motion was denied.

6. Subsequent motions for new trial by Messrs. Young and others were denied.

7. Separate actions were docketed in the Supreme Court, as Numbers 23155 and 23224, above referred, by Mr. Freed and by Messrs. Young et al., both within proper time under the Colorado rules, and these actions were by order of Court consolidated.

8. Briefs were filed by the several parties, those briefs, insofar as concerns Sergeant Freed, raising in detail

each of the federal and constitutional questions here presented, and indeed primarily involving those questions. The City Attorney concurred. The Briefs are not transmitted as part of the record, in accordance with the advice of the Clerk of the Colorado Supreme Court that such is not generally the custom in transmission of record, but are available if necessary or desireable to the Court in connection with mode of raising of the Federal Question.

9. The American Legion, Department of Colorado, sought to be permitted to file Amicus Curiae Briefs, and was granted that permission, pointing out to the Court therein the necessity under Federal Constitutional Law of granting to veterans of the Korean Conflict, as well as to Vietnam Veterans, the same rights as allowed to Veterans of World War II, insofar as concerns Veterans Preference Points.

10. The matter having come to issue was expedited on the docket as one of substantial public moment, and was orally argued.

11. On July 15, 1968, there was issued an opinion of the Court, and dissenting opinions of the Chief Justice and Mr. Justice Kelley, Appendix A, A-1, and A-2 hereto annexed.

12. On July 27, within the time permitted by Rule, there was filed Petition For Rehearing on behalf of Sergeant Freed, raising each of the constitutional questions and federal statutory questions herein presented and theretofore raised by the Briefs.

13. On August 6, 1968, the Petition for Rehearing was denied and remittitur issued, remittitur being the

judgment of the Supreme Court under its prevailing procedures.

14. Notice of Appeal, as provided by Rule 10 of the Rules of the Supreme Court of the United States, was filed on August 16, 1968, with service properly made as therein provided and properly certified.

15. The designation of the record was made as required by Rule 12, as a part of the Notice of Appeal, and the record has been accordingly prepared and is transmitted herewith.

16. The Federal Questions here involved have been raised at all stages of the proceeding, by pleadings, by argument of counsel, by motions for new trial and briefs and memoranda in support thereof, in the briefs before the Supreme Court, in motion for rehearing, in Amicus briefs permitted to be filed and filed with the Supreme Court of Colorado, and in the Notice of Appeal. They are, for all practical purposes, the only questions which been before the Court or argued to it, and they are the questions which the Court has given attention both in its opinion and in the several dissenting opinions.

III. It is believed and submitted that jurisdiction of this appeal is conferred upon this Court, and this Appeal is taken in pursuance of Title 28 USCA, Section 1257(1) and Section 257(2), above referred.

IV. Cases believed to sustain the jurisdiction of this Court are as follows:

The problem involved in this case is essentially a federal problem, that is, what is 'time of war'' or a ''period of war'', and what is the effect, insofar as a State Con-

stitutional Provision, dependent for its operation upon definition—not contained therein except by reference to federal action—of the federal statutes defining the Korean Conflict as a "time of war" or "period of war", and of the United Nations Charter, as a Treaty, requiring participation of the United States in that conflict.

The problem is resolvable, basically, only by the Supreme Court of the United States.

The question has been carefully considered by the Colorado Supreme Court, and there have been written in the action three separate opinions, that of the majority apparently considering that Korean Conflict, despite the statement of Congress in the statutes involved, is not a "time or war" or "period of war" because not a "declared" war, and those of the dissenting justices being entirely at variance therewith.

The principal cases decided by the Supreme Court of the United States on this point are *The Prize Cases,* 67 U.S. 635, 666, 2 Black 635, 666, 17 L.Ed. 459. There, the Supreme Court of the United States defined "war" to be that state in which a nation prosecutes its right by force, and simply that.

This Court has, in *Youngstown vs. Sawyer,* 343 U.S. 579, 72 S.C. 863, 96 L.Ed. 153, specifically stated "that a state of war may in fact exist, without a formal declaration". Further, as regards participation in war as the term is utilized with reference to the Selective Service Laws, this Court has stated, in *Sicurella vs. United States,* 348 U.S. 385, 75 S.Ct 403, 99 L.Ed. 436:

> "We believe congres had in mind real shooting wars when it referred to participation in war in any form

—actual military conflicts between nations on earth in our time—wars with bombs, and bullets, tanks, planes, and rockets."

There is little authority other than this in the Supreme Court of the United States concerning what constitutes a state of war, but there is imperative need for that determination. Thus, in July, 1968, the Court of Military Appeals, in the matter of *Army SP4 Clayton Anderson,* has held that the United States is currently, insofar as concerns the Vietnam Conflict, at war. (17 *USCMA* 588—38 *CMR* 386—*U.S. vs. Clayton Anderson*)

As we are advised, there are presently pending before the Supreme Court several applications for certiorari, with reference to matter of reserve calls, and the propriety thereof with relation to Vietnam, raising the question of whether Vietnam constitutes "war", in which matters, as we understood, some temporary stay proceedings have been denied by this Court.

The City Attorney of the City and County of Denver has in the initial representation of Sergeant Freed, as well as by express filing in the Supreme Court of Colorado, taken a position that the veterans preference points were allowable to Sergeant Freed.

The American Legion, Department of Colorado, has specifically appeared by reason of the seriousness of the questions here presented to all veterans, and particularly those of the Korean and Vietnamese conflicts.

It is believed and submitted, therefor, that the within matter is properly within the cognizance of the Supreme Court of the United States and ought be in some manner

resolved, only this Honorable Court having the authority to make such an ultimate resolution. Others of the pertinent authorities are discussed hereinbelow.

QUESTIONS PRESENTED BY APPEAL.

The ultimate question presented by the appeal is whether or not the Korean Conflict, defined by Federal Statute as a "period of war", and required by United Nations Charter, a Treaty commitment of the United States, is in fact such a "time of war" or "period of war" as to require recognition as such by the State of Colorado, when applying its constitutional provision on veterans preference points, requiring allowance of those points to veterans engaged in specified conflicts through World War II, 'and the period of any war in which the United States may hereafter engage."

That question involves the Supremacy Clause, both as concerns the subject federal statutes, and the United Nations Charter as a treaty.

It involves, also, equal protection under the Fourteenth Amendment, and the question whether it is permissible to hold that while World War II, extended to April, 1952, is a "time of war" or "period of war" for which preference points in civil service may be allowed, the Korean Conflict, extending from a later date in 1952 through 1956, is not such a "time of war" or "period of war".

A. "WAR" HAS BEEN LONG AND REALISTICALLY DEFINED BY UNITED STATES COURTS.

In the *Prize Cases*, 67 U.S. 635, 666, 2 Black 635, 666, 17 L.Ed. 459, the Supreme Court of the United States

defines "war" as simply that state in which a nation prosecutes its right by force, that definition being adopted in *The Chapman,* 5 Fed. Cas. 471, 475, and *Hubbard vs. Harmden Express Co.*, 10 R.I. 244, 249, similarly following it.

Parties belligerent in a war are usually independent nations, but is not needful to constitute war that both parties be acknowledged either as independent nations or sovereign states, and war may exist where one belligerent claims sovereign right as against the other. Similarly, it has been said that where the parties in a rebellion occupy and hold in hostile manner a certain portion of territory, have declared their independence, have case off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest in which they engage as a "war". It has been repeated stated that it is not less a civil war because one side may choose to call it "insurrection".

Therein lies the weakness of the majority Opinion in the Colorado Court, which appears to find need of some manner of "declaration", and which engages in the sophistry that Korea was a "police action" or some other euphemism of like effect. It is submitted, contrarily, that armed conflict between sovereign states or those striving for or claiming sovereignty, or in rebellion against the sovereign, is "war", whatever it may be called or labelled otherwsie, and for whatever reason.

A situation almost identical with that presented by Korea arose in *Hamilton vs. McCalughry, Warden,* 136 Fed. 445 (C.D., Dist. Kansas, 1905), in which the Court held that the Boxer Rebellion, claimed to be a "police action", was most certainly a "war", despite the fact

that at no time had there been a formal declaration of war by the government of the United States against either the government of China or the "Boxer" element thereof.

The Court clearly disposed of the argument that a formal "declaration" is necessary to a state of war:

> "A formal declaraion of war however, is unnecessary to constitute a condition of war. Adopting the definition of war quoted with approval by the Supreme Court, the question here is whether this government was, at the time of the homicide by the petitioner, prosecuting it rights in Chinese territory by force of arms."

The Court pointed out the necessity of protection by any government of its citizens by force of arms, and detailed the history of the Boxer troubles, the seige of the legations in Peking, and their final relief by an international force, to which the United States contributed, some 5,000 men out of 15,000 altogether involved, engaging in a series of armed engagements, "resulting in considerable loss of life to the forces of this government."

The Court pointed out that by act of Congress pay of officers and men in the military service of the country during the time they were in occupied China was increased to the amount paid in time of actual war "notwithstanding the fact that during all the time of the military occupation of China by this and other foreign nations, the government of China maintained with this and other foreign nations engage in such occupation a footing of peace, and notwithstanding the further fact that at no time was there any declaration of war on the part of this government against the government of China."

The problem was whether or not the circumstance was

such as to constitute a "condition of war" within the Articles of War, and the Court held that it specifically was, denying certiorari:

> "Yet I am constrained to hold that by reason of the occupation of Chinese territory by the large military force of this government, under authority of the Department of War, the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government there engage on a war basis and all other facts and circumstances in this case, at the time the homicide in question was committed there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war, *for that this government was there asserting its right of protection over the citizens and accredited representatives of this government, and their property, by force of arms;...*" [Emphasis supplied].

The Supreme Court in *Youngstown vs. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 153 has recognized specifically that " a state of war may in fact exist, without a formal declaration."

This Court in *Sicurella vs. United States*, 348 U.S. 385, 70 S.Ct. 403, 99 L.Ed. 436 supra, has further stated that "we believe congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations on earth in our time—wars with bombs and bullets, tanks, planes, and rockets."

Hooker vs. New York Life Ins. Co., 161 F.2d 852 (CCA 7th, 1947) points out that where a person enters the military service of his country, which is engaged in war with an enemy country, every act performed in training and preparation for actual combat service under the command of military authority is a necessary and incidental part of "war".

The Court of Military Appeals, accordingly, and most recently, following this line of reasoning, has held the current Vietnamese situation, no matter what euphemism may be used for it, is "war". *U.S. vs. Anderson,* 38 CMR 386, 17 USCMA 588.

B. STATUTORILY AND IN FACT THE "KOREAN CONFLICT" *WAS A "WAR", WHETHER OR NOT DECLARED.*

The Supreme Law of The Land is, under the Constitution, the Constitution of the United States and the Laws and Treaties in pursuance thereof, one of which is the United Nations Charter, 59 Stat. 1031.

Article 42 of the Charter provides:

> "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

So long as that Treaty, the Charter, remains in effect, as it certainly was at the time of Korea, the policy of the

United Nations was the policy of the United States, which in Korea, under United Nations Direction, "prosecuted its right by force" or engaged in "war", as required by sections 42 and 43 of the Charter. Several millions of men participated directly and indirectly in those proceedings, and four years of bitter conflict were the result.

The United States could not, without repudiation of its treaty obligation, have declined to furnish those men. The State of Colorado would not, without violation both of the Supremacy Clause and of the Fourteenth Amendment, deprive those who so served of the rights accorded others who have served the United States in arms in time of war.

As quoted above, the United States recognized the Korean war or conflict, enacting on September 2, 1958, Public Law 857, 72 Stat. 1105 Title 38 U.S.C.A.), Sections 101(9)-101(12), including the Korean Conflict in "period of war", defining as "veteran" "any veteran who served in active military, naval, or air service during a period of war", and defining the "Korean Conflict" to be "the period beginning June 27, 1950, and ending on January 31, 1955".

38 U.S.C.A., page XXX, "Table 2 America's Wars" contains the following entry:

KOREAN CONFLICT (June 27, 1950—January 31, 1955)

Participants	6,807,000
Deaths in Service	54,000
Living Veterans (June 30, 1958)	5,353,000

The same work, commencing at page 1, comments thus on the Korean Conflict:

> "Under Public Law 38, 82d Congress, May 11, 1951 (ch. 49, 65 Stat. 40), various benefits for World War II service—including compensation and pension—were extended on the same basis for service during the Korean conflict period (after June 26, 1950, and before February 1, 1955)."

It is accordingly submitted that it is an absurdity to pretend that Korea, defined by Act of Congress as a period of war, giving rise to veterans rights identical with those during other periods of war, may be ignored as a period of war or time of war under the Colorado Constitution. The Constitution does not so provide. If it did, it would violate supremacy clauses and equal protection clauses of the United States Constitution, and it is submitted that in so causing it to do, the Supreme Court of Colorado has committed grave and constitutional error, reviewable on appeal by this Court.

Weissman vs. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal., 1953) states the matter rather succinctly;

> "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war. Certainly those who have been called upon to suffer injury and maiming, or to sacrifice their lives, would be unanimous in their opinion that this is war—war in all of its horrible aspects. And the families deprived of the love and companionship of their sons, brothers, husbands and fathers—who meet each day with hope and fear for their boys and men in Korea—and the widows and orphans of the men who died there—certainly, they are aware of the stark reality that the Korea conflict is war."

See also, and similarly, *Gagliormella* et al. *vs. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D.C., Mass., 1954), where the Court remarks that "the alleged difficulty that a court would have in determining whether a war existed in the absence of a declaration by Congress seems to me unfounded. Surely it is not more difficult for a court to determine whether the United States is de facto at war than to determine whether a country without a constitution or a formal method of declaring itself is at "war."

Lynch vs. National Life and Accident Insurance Company, 278 S.W. 2d 32 (Mo., St. Louis App., 1955) succinctly stated:

> "We are not willing to shut our eyes to the inescapable fact that the United States was engaged in a 'shooting war' in Korea, which is clearly and forcefully demonstrated by casualties inflicted upon members of the military forces of the United States in the total sum of 139,834, of whom 25,604 were killed, 103,492 wounded, and 10,748 missing or captured.... What additional proof is required to conclusively establish that such grim consequences can only result from a war as that term is understood by individuals of ordinary and common understanding."

The Supreme Judicial Court of Massachusetts, in *Gudewitz vs. John Hancock Mutual Life Insurance Company,* 122 N.E.2d 900 (1954) held simply that "war" includes everything ordinary people regard as war, and includes conflict between armed forces of different nations under authority of their respective governments, whether declared or not, and particularly included Korea.

Much in the same way, and in a very well considered opinion, The Supreme Court of Texas, in *Western Reserve Life Ins. Co. vs. Meadows,* 261 S.W.2d 554 (1953), held

that war may exist without declaration, and that the term ought be considered in a practical and realistic sense, and not a technical or formal one, the plain meaning of "war" being "war in fact", and that "every forcible contest between two governments, de facto, or de jure, is war. War is an existing fact, and not a legislative decree."

SUBSTANTIALITY OF GROUNDS.

It is most respectfully submitted that the grounds upon which this Honorable Court is requested to take jurisdiction upon appeal here are the most substantial.

The fact and condition of existence of "war" is perhaps the most vital single factor of our time. It has for nearly two generations been the controlling element in our societal organization.

Vast portions or our physical wealth; inmeasurable sacrifice of our population itself; has been engaged for many years past in military effort. World War II was succeeded by Korea, and that has been succeeded by Vietnam. The fact of military engagement is inescapable. Its legal results must be made clear.

It was recognized by the People of Colorado that some manner of benefit should derive, in point of preference in the public service, to persons veterans of the military service—and hence contributors to the public well being—in time of war. By an amendment to the Constitution, setting forth specifically all armed conflicts which could have been of practical moment at the time of adoption, and providing like benefits for all others engaged in future in like conflict, the people sought to reward wartime military service, and to solice wartime military disability.

The Colorado Court has argued in the majority opinion that there is something absurd about this, that the People could not have meant an "undeclared" war; and that they could not, despite their declaration to the contrary, have meant to give to these young men struggling and dying after the end of World War II the same benefits conferred upon World War II veterans.

Surely such a thesis is not tenable. The conflict is no different. The sacrifice is not less great. The service is no less valid.

Some time ago we had the fortune to present before this Court argument in *Lucas vs. Forty-fourth General Assembly*, 379 U.S. 693, 85 S.Ct. 715, 13 L.E2d 699, one of the reapportionment cases. A Colorado constitutional amendment on districting and voting was there invalidated. It was argued in support of that amendment that it had been popularly adopted. It was pointed out by this Court rather clearly that popular enactment even of a State Constitutional Amendment cannot transcend the bounds of equal protection allowed and granted by the Fourteenth Amendment, and if it essays so to do, then that State Constitutional Provision must fail.

We most respectfully submit that if, as the majority of the Colorado Court contends, "war" does not include a Treaty-required activity such as Korea, defined by Congress to be "war" and its period a "time of war" or "period of war", and if "war" be arbitrarily limited to the period of World War II, extended by definition to 1952, nearly 5 years after its actual ending, but Korea and, by extension, Vietnam, be excluded, there can be no basis upon which the public bounty and public service are opened to those who have protected the public in the one instance,

and closed, almost insuperably, to those a generation later who protect it in identical manner.

War is a federal question. External relations are a federal matter. Definition of that status is for the federal government, not for any state or its courts.

If preference in the public service is a benefit of service in armed forces in time of war, then it must be so in like manner to all who serve. If this is not so, then there is a serious deprivation of basic right of an entire generation of young men, among them Sergeant Freed, but like him all Korean and Vietnam veterans.

The issue is clear drawn and unequivocal. It is the question whether this generation, having served in Korea or in Vietnam or wherever else active military participation may call it, must be subject to the whim of form, or is entitled to the same basic right accorded parent and elders for similar service a generation or a decade earlier. This is question of equal protection on the broadest and most basic scale, and we urge, therefore, question most manifestly substantive and urgent of determination.

Like issues are necessarily arising continually, and can be resolved only by the clarifying action of this Court, which, accordingly, we urge, should take jurisdiction in the instant appeal.

Most respectfully submitted,

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APPENDIX A

No. 23155

JEROME R. FREED, Plaintiff in Error,

vs.

RONALD J. BALDI, et al., Defendants in Error.

No. 23224

ANDY L. YOUNG, et al., Plaintiffs in Error,

vs.

THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF DENVER, et al.,

Defendants in Error.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER
HON. JAMES FLANIGAN, JUDGE

EN BANC JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

Creamer & Creamer

For Jerome R. Freed,
Plaintiff in Error in No. 23155
Defendant in Error in No. 23224

Edward O. Geer
Donald L. Dill

For Andy L. Young, et al.,
Plaintiffs in Error in No. 23224
Defendants in Error in No. 23155

Martin Zerobnick

For Defendants in Error Ronald J. Baldi, et al.

Max P. Zall, City Attorney
Brian H. Goral, Assistant City Attorney

For Defendants in Error City and County of Denver, its Departments, and the Civil Service Commission

William J. Chisholm
Emory L. O'Connell
Amicus Curiae

On Behalf of The American Legion
Department of Colorado

MR. JUSTICE DAY delivered the opinion of the Court.

Two actions in the lower court were consolidated for trial. From the orders and judgment entered in the two cases below, separate writs of error were issued out of this court. The two were consolidated here. The answer to the one central issue will decide both suits. The sole question for our determination is as follows:

IS A PERSON WHO HAS SERVED IN THE ARMED FORCES SUBSEQUENT TO APRIL 28, 1952, DURING THE TIME OF THE "KOREAN CONFLICT," ENTITLED TO VETERAN'S PREFERENCE POINTS UNDER THE COLORADO CONSTITUTION AS HAVING SERVED IN TIME OF WAR?

We answer the question in the negative.

The controversy arose in connection with the promotional examination for the rank of sergeant of police conducted by the City and County of Denver Civil Serv-

ice Commission. Plaintiff in error, Jerome R. Freed, a patrolman, had taken the examination and received the score of 80.54 to which were added ten veteran's preference points by reason of Freed's service and a service-connected disability in the Armed Forces between June 13, 1952, and June 12, 1956. This period covered a portion of the time in which the United States was engaged in hostilities in Korea. Without the veteran's preference points Freed would have placed 56th on the eligibility list for promotion to sergeant; with his composite score of 90.54, he was ranked third on the list. With Freed in third place, defendant in error Baldi was No. 7 when on April 14, 1966, the Manager of Safety asked the Civil Service Commission to certify to him names of six patrolmen for promotion to the rank of sergeant.

Baldi brought suit in May of 1966 in the Denver District Court in the nature of mandamus to compel the Civil Service Commission to certify his name for promotion and to compel the Manager of Safety to promote him to the rank of sergeant, alleging that by reason of awarding veteran's preference points to Freed illegally, Baldi was not among the first six on the list; whereas, if Freed's name were eliminated, he would be among the first six and entitled to the promotion.

In January 1967, a similar action was filed by 34 of the patrolmen who remained on the Civil Service eligibility list above the 56th place where Freed would have been had he not been awarded the ten veteran's preference points. These plaintiffs alleged that if the veteran's preference points had not been illegally awarded to Freed and added to his examination score, they would be eligible for promotion before Freed. In their prayer they ask for a temporary and permanent restraining order to prohibit the Civil Service Commission from vacating or terminating the

eligibility list for promotion to the rank of sergeant until all persons above the position at which Freed should have been correctly listed were promoted to the rank of sergeant. They also asked for an order granting the plaintiffs, when promoted, seniority *nunc pro tunc* to the date of the illegal promotion of Freed.

In a single order entered in both cases, the trial court ruled:

"• • •

"(2) The plaintiffs in both of these cases had higher composite scores in the Merit Examination Results in effect next prior to March 30, 1966, than defendant Jerome R. Freed.

"(3) That Defendant Jerome R. Freed was wrongfully alloted ten (10) World War II Veteran's preference points which in the aggregate gave him a composite score of 90.54% and without which he would have had 80.54%.

"(4) That defendant Freed having served in the Armed Forces from June 13, 1952 until June 12, 1956 was not entitled to World War II Veteran's preference points, in that World War II ended for the purposes of Article XII, Section 14 of the Constitution of the State of Colorado on April 28, 1952.

"(5) That plaintiff Baldi should have been promoted on May 1, 1966 to Sergeant of Police.

"(6) That the plaintiffs in case No. B-98985 should all have been placed above Defendant Freed on the eligibility list in effect on May 1, 1966.

"(7) That the defendant Civil Service Commission and its individual member defendants [the Chief of

Police and Manager of Safety] acted contrary to law in not promoting plaintiff Baldi on May 1, 1966.

The order and judgment of the court were:

"(1) Plaintiff Ronald J. Baldi be promoted to the grade of Sergeant of Police, *nunc pro tunc,* as of May 1, 1966 and

"(2) That the list in effect as to all times material to case No. B-98985 be and hereby is stayed pending litigation of the controversies in that case."

The article of the Colorado constitution requiring interpretation in this controversy is Article XII, Section 14 which provides as follows:

"Veterans preference.—In each and every examination held or conducted by the state civil service commission, the state merit council, the civil service commission of any political subdivision of the state, including cities, towns and cities and counties chartered or to be chartered under the XXth amendment to the constitution of the state of Colorado, or by the successors of any such commissions or council having all or a part of the duties thereof, or held or conducted by any other officer, agency, department of the state or employee thereof, for appointment and employment in and promotions to offices and places of trust and employment in the classified civil service of the state, or in the civil service of any of its political subdivisions as aforesaid, the passing grade for each candidate shall be the same. Five points shall be added to the grades of candidates receiving a passing grade who served in the armed forces of the United States *in times of war* and who were honorably discharged therefrom, and also to the grades of candidates who are widows of those who so served and were so discharged or who died during

their service. Ten points shall be added to the grades of candidates receiving a passing grade who incurred disability in the line of duty while so serving and who were so discharged. Eligibility list shall be kept and maintained for reasonable periods of all who have made passing grades in such examinations and the candidates placed thereon in the order of the grades received by them, including any points added as herein provided. The persons on said lists shall be deemed the most fit and of the highest excellence, and shall be appointed or promoted in accordance with their order thereon.

"The times of war above referred to are the period of the Spanish-American War; the period of the Philippine Insurrection; the period from April 6, 1917, to November 11, 1918, both dates inclusive; the period from December 7, 1941, to the date proclaimed by the congress or president of the United States as the end of the war declared by the United States on December 8, 1941, both dates inclusive; *and the period of any war in which the United States may hereafter engage.* The armed forces above referred to are the United States army, the United States navy, and the United States marine corps; and shall include those who served in the United States coast guard during the period commencing December 7, 1941, and ending as aforesaid, and in any future war in which said guard shall be actively engaged.

"The certificate of the war department, the navy department or of the United States veterans administration, or of any of the successors thereof, shall be conclusive proof of service, of honorable discharge, or of disability incurred in line of duty during such service.

"This section of the constitution shall be in full force and effect from the date of its approval by the vote of the people, as provided in this constitution, and it shall be in all respects self-enacting." [Emphasis added.]

It is agreed that the official date of the termination of World War II is April 28, 1952, the date that Congress finally ratified the Japanese Peace Treaty and the day on which Congress declared the end of said war under the Constitution. It is also agreed that the period in which the United States made its forces available in Korea pursuant to treaty responsibilities under the United Nations Charter to which the United States subscribed, was the period between June 27, 1950, and January 31, 1955. 38 U.S.C.A. 101(9).

In *Pyramid Life Insurance Co. v. Masch,* 134 Colo. 70, 299 P.2d 117, this court said that the Korean conflict is not encompassed in the phrase "in times of war" as used in an insurance contract. In the *Pyramid* case, the life insurance contract provided that if the insured died while in military service "in times of war * * *," the liability of the insurance company would be limited to the return of the premiums paid. The insured died while in military service in the Korean conflict, and this court ruled as follows:

"We are asked to take judicial notice that the engagements of the United States troops in Korea constituted 'War'; this, in spite of the fact, as counsel for defendant admit, that 'war' was never declared by Congress, the only authority competent to declare it, with respect to the action in Korea. *The existence or nonexistence of a state of war is a political, not a judicial, question and it is only when a formal declaration of war has been made by the Congress that judicial cog-*

nizance may be taken thereof. Once so declared by the political department, it becomes binding upon the courts, otherwise not. * * *" [Emphasis added.]

The reasoning in the *Pyramid* case is applicable to the case at bar. The phrase "in times of war" in the Constitution is identical to that used in the insurance policy in *Pyramid.* From 1798 to the present time, the United States has sent its armed forces abroad over 150 times. See *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A.2d 202. Most, if not all, of these military expeditions actually involved nearly every aspect of war but were not recognized officially, judicially, or historically as war. For a much briefer time, but nevertheless in a similar respect, the United States since the Korean conflict has sent members of the armed forces to South America. The Constitution expressly provides that veteran's preference points be awarded to those who served during the Spanish American War, World War I and World War II, all three having been wars declared by the United States Congress. The framers of the amendment by specially mentioning the veterans of the Philippine Insurrection which was not a declared war, indicated that specific inclusion of the Philippine Insurrection was deliberately done because it otherwise would not have been encompassed in the general phrase "in times of war" as used in the constitution. Had those who drafted and submitted the constitutional amendment to the vote of the electorate intended to grant preference to every veteran in service in the armed forces at a time when the United States was engaged in any kind of armed conflict, whether large or small, it would have been a simple matter to use the proper words and to define "war" as any hostility whether or not Congress has officially declared a state of war. While it is our duty to construe the constitutional provisions, it is not in our province

to substitute other words for those used in the constitution or place a forced construction on them. We hold, therefore, that the reference "in times of war" and "the period of any war in which the United States may hereafter engage" refers to war officially declared by Congress.

The trial court, therefore, properly ruled that Freed was wrongfully alloted veteran's preference points; it erred, however, in case No. 23155, in not ordering that Freed's illegal promotion to the rank of sergeant be rescinded, and that he be reinstated as a patrolman with his position on the eligibility list determined by his score without any preference points. The judgment and order of the trial court in case No. 23224, in which the Commission was prohibited from terminating the eligibility list, should be vacated and held for naught and that action dismissed. Both cases are remanded to the trial court with instructions to proceed in accordance with this opinion.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE KELLEY dissent.

APPENDIX A-1

MR. CHIEF JUSTICE MOORE dissenting.

I respectfully dissent. The veterans preference provision of the Constitution of Colorado, namely, Article XII, Section 14, was adopted prior to the conflict in Korea. By the provisions of that article preferences for civil service employment were granted to veterans of specifically named wars and also to military personnal serving in "* * * the period of any war in which the United States may hereafter engage."

It is my judgment that the so-called Korean conflict was a "war" and that the United States did "engage" therein. When the "war" began and when it ended are questions of fact to be determined by consideration of the totality of activity being carried on at any given time, and not by resort to calling the conflict something other than what it actually is.

If a soldier was in the service at a time when actual war was being fought, in my judgment he is entitled to the preference provided by the constitution, without regard to the question of whether war had been declared by act of Congress.

No. 23155 — FREED v. BALDI, et al.

NO. 23224 — YOUNG v. CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF DENVER, et al.

APPENDIX A-2

MR. JUSTICE KELLEY dissenting:

Because of the urgent need for an answer to the question posed by this lawsuit, I have not had the time since the adoption of the majority opinion to research the matter to the extent I would like to.

We are here concerned with the application of a provision of the state constitution which attempts to give a civil service examination grade preference to those "who served in the armed forces of the United States *in times of war.*" XII, Sec. 14.

"Times of War" is defined as including, "the period of the Spanish American War; the period of the Phillipine Insurrection; the period from April 6, 1917, to November 11, 1918, both dates inclusive; the period from December 7, 1941, to the date proclaimed by the Congress or President of the United States as the end of the war declared by the United States on December 8, 1941, both dates inclusive; and *the period of any war in which the United States may hereafter engage.*"

The veteran's preference section was adopted by the people on November 7, 1944, prior to the cessation of hostilities of World War II. The people of Colorado did not anticipate the "police action" in Korea or the unpleasantness in Viet Nam. They were only concerned with "any" *war.*

The majority opinion relies on *Pyramid Life Insurance Co. v. Masch,* 134 Colo. 70, 299 P.2d 117. The death

of the insured occurred during the Korean "engagements." The court, in affirming a lower court decision, held that the complaint stated a claim on which relief could be granted. In doing so, this court refused "to take judicial notice that the engagements of United States troops in Korea constituted 'war.'" Death of the insured, under the terms of the policy, "while in military service • • • in time of war," limited the company's liability to the return of the premiums.

The policy was issued January 17, 1941. Although this was eleven months prior to Pearl Harbor, it was almost two years after the start of the Hitler *skirmishes* in Europe. Under these circumstances, it would have been a simple matter for *Pyramid* to have employed language broad enough to have included the so-called undeclared wars, in order to have limited its liability.

The same guidelines, in my opinion, should not be applied in interpreting a covenant between *all* of the people of the state and the relatively small portion of the people who serve the country in times of military conflict by whatever name it may be called, as those which are applied to an insurance contract. The contract is between private citizens; it is unilaterally prepared, though bilaterally executed. Courts, in general, construe the terms of contracts of insurance against the company whenever an ambiguity exists.

In interpreting a constitutional provision adopted by the people, the court should, if possible, interpret it in a way that will carry out *the intent of the people.* I do not feel that the majority opinion has applied this standard in its approach to the problem.

The majority equate "in time of war" (which is the

language of the constitution) with "declared war," simply because the section 14 enumerates certain military engagements which have been labeled by Congress as "Wars."

The majority opinion fails to note that on September 2, 1958, Congress enacted Public Law 85-857, 72 Stat. 1105 (Title 38 U.S.C.A.) which in the section on definitions" provides:

> "The term 'period of war,' means the Spanish-American War, World War I, World War II, the Korean Conflict, and the period beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of Congress." (38 U.S.C.A. 101 (11)).

Concededly, the quoted language does not rise to the dignity of a declaration of war, *expost facto,* it certainly is an acknowledgment that the Korean conflict was "a period of *war,*" rather than a *police action.*

An enlightening and well reasoned decision having more in common with the problem at hand than the *Pyramid* case is *Miele v. McGuire,* 147 A.2d 827 (N.J.), decided January 13, 1959. The case involved the New Jersey Veterans' Tenure Act, which provided that no person holding a position or office under the government of the state or of any county, municipality or board of education, who has served in the armed services of the United States *in any war* of the United States and who has been honorably discharged, shall be removed from office except for good cause after an impartial hearing. The veteran was discharged without being charged and no hearing was afforded him. The New Jersey court pointed out that:

"Under our present membership in the United Nations, a declaration of war by the Congress is no longer necessary in order to commit our armed forces to combat. The United Nations Charter, 59 Stat. 1031, to which the United States subscribes, provides for a security council. Article 42 of the Charter empowers the security council to take action with air, sea or land forces to maintain or restore international peace and security. Article 43 of the Charter provides that all members of the United Nations shall undertake to make available to the security council armed forces to maintain international peace and security. The United States did make a force available in 1950, when the Korean conflict broke out. The United States, having been called upon by the security council as a member of the United Nations, was required to accept the responsibilities it had agreed to undertake through its membership or to repudiate Articles 42 and 43 and abandon the whole purpose of the United Nations. Pursuant to this request under Article 43 to contribute armed forces and other assistance to maintain international peace and security, the United States called several million of its citizens, including a large number who had already served in World War II, into service. Plaintiff was one of those who served. It would be difficult to convince those citizens and their families, particularly where death and injuries occurred during the Korean conflict, that this was not a war in every sense of that word. Lack of a formal declaration of war did not mitigate the suffering of the wounded nor the sorrow of the families of the dead."

Professor Beale in an article in 9 Harvard Law Review, pages 406, 407, states:

"War, in law, is not a mere contest of physical force,

> on however large a scale. It must be an armed struggle, carried on between two political bodies, each of which exercises de facto authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war. It requires, them, on the part of insurgents an organization purporting to have the characteristics of a state, though not yet recognized as such. The armed insurgents must act under the direction of this organized civil authority."

In *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, the United States Supreme Court said:

> "Of course, a state of war may in fact exist without a formal declaration."

President Truman, on December 16, 1950, declared that a state of "national emergency existed" because of the Korean conflict.

On April 8, 1952, in another Presidential proclamation, the following words appear:

> "Whereas American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United Nations are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; * * *"

Conceding that Presidential proclamations do not rise to the dignity of Acts of Congress, we cannot shut our eyes to the realities of the situation in favor of strict legalisms when construing the meaning of a constitutional amendment.

The New Jersey court in *Miele v. McGuire, supra,* concluded that:

> "Under these circumstances, it must be concluded that the United States was at war during the Korean conflict * * *."

Another pronouncement by the United States Supreme Court is pertinent to this discussion. In *Sicurella v. U.S.,* 348 U.S. 385 (1955), a case involving a claim of draft exemption by a conscientious objector, the court said:

> "We believe congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations on earth in our time—wars with bombs and bullets, tanks, planes and rockets."

I am convinced that the voters of Colorado had the same thing in mind wthen they said, "Five points shall be added to the grades of candidates receiving a passing grade who served in the armed forces of the United States in times of war * * *." Surely the constitution uses the term "war" in its generic sense and not the technical sense ascribed to the term in the insurance policy in the *Pyramid* decision. I believe that the voters of Colorado recognized that war can be declared by deeds as well as words.

It is my belief that a gross inequity exists when the benefits of public laws discriminate as between members of the same class—those who have served the United States *in times of war.*

APPENDIX B

UNITED NATIONS CHARTER

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

ARTICLE 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

ARTICLE 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

ARTICLE 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect, to its decisions, and it may call upon the Mmebers of the United Nations to apply such measures. These may

include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

ARTICLE 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

ARTICLE 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the

signatory states in accordance with their respective constitutional processes.

ARTICLE 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

ARTICLE 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

ARTICLE 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the military Staff Committee.

ARTICLE 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military re-

quirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

ARTICLE 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their

action in the appropriate international agencies of which they are members.

ARTICLE 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

ARTICLE 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

ARTICLE 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

FREED *v.* BALDI ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 652. Decided January 13, 1969.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.